



ISS Guidance Regarding Compensation Policies for the 2011 Proxy Season

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Editor's Note: [Jeremy Goldstein](#) is a partner at Wachtell, Lipton, Rosen & Katz active in the firm's executive compensation and corporate governance practices. This post is based on a Wachtell Lipton firm memorandum by Mr. Goldstein, [David E. Kahan](#) and [Timothy G. Moore](#).

Institutional Shareholder Services, Inc. (ISS) recently published [Frequently Asked Questions](#) (FAQs) regarding its U.S. compensation policies for 2011. The FAQs address a number of issues regarding the shareholder advisory votes on executive compensation required by the Dodd-Frank Act (Dodd-Frank) and provide useful clarification of a number of other recent ISS pronouncements.

Say-on-Pay Frequency Vote. The FAQs clarify that a management recommendation of a biennial or triennial vote will not trigger a negative vote recommendation from ISS on other proxy items, notwithstanding ISS's categorical support of annual say-on-pay votes. In addition, the FAQs indicate that ISS plans to address in next year's policy updates how it will treat a company's adoption of a frequency vote that is not supported by a plurality of votes cast at the 2011 shareholders' meeting.

Golden Parachute Say-on-Pay. The FAQs emphasize that ISS will approach the golden parachute say-on-pay vote on a case-by-case basis, taking into account all relevant factors. While ISS's holistic approach could potentially result in additional scrutiny for outsized gross-up payments, even if previously disclosed under a pre-existing agreement, the FAQs appear to indicate that no single feature will automatically give rise to a negative recommendation without consideration of context, explicitly stating that a single-trigger provision in an equity compensation plan will not automatically result in a negative recommendation – either for say-on-pay purposes or with respect to votes on the plan, the compensation committee or the full board.

New Golden Parachute Disclosure Option. The SEC's proposed rules regarding the golden parachute advisory vote would under certain circumstances permit companies to avoid a separate vote in connection with a merger or similar transaction if the proxy statement for the

previous say-on-pay vote disclosed the golden parachute payments using the table required by the new golden parachute disclosure rules. ISS clarifies in its guidance that it has no policy regarding whether a company should use the new golden parachute tabular disclosures in its annual proxy disclosure. If, however, a company does include the new golden parachute tabular disclosures in its annual proxy disclosures, ISS will weigh such disclosures more heavily in its overall say-on-pay vote recommendation.

Grandfathered Arrangements. ISS has historically not taken action against companies by reason of so-called “problematic” or “egregious” pay practices in pre-existing agreements. ISS’s most recent annual policy updates introduced confusion as to whether it had changed this position with respect to pre-existing agreements that automatically renew (so-called “evergreen” agreements). The FAQs clarify that ISS will take all agreements (including pre-existing agreements) into account in its holistic review of pay practices, but imply that the provisions of a pre-existing evergreen agreement will not receive the heightened scrutiny applicable to those of new or affirmatively extended agreements, unless the agreement is materially amended in a manner contrary to shareholder interests.

Future Commitments. In recent years, some companies have coupled adoption of an ISS-disapproved practice (e.g., tax gross-ups) with a commitment not to engage in such practices in the future. While ISS has previously reacted favorably to such commitments, the FAQs state that “commitments not to enact problematic features in future agreements will no longer mitigate the enacting of problematic pay practices in new or amended agreements during the prior fiscal year.”